

PUBLIC LAW BOARD NO. 4244

Award No. 238

Case No. 245

Carrier File No. MWE981123AA

Organization File No. 150-1311-9815.CLM

Parties to Dispute:

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**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES**

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BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim:

1. The Carrier violated the Agreement when on October 6, 1998, the Carrier issued a Level S, twenty-day suspension to Mr. M. A. Flores for the alleged violation of Rules 1.4, 1.6 and 1.13 of the Maintenance of Way Operating Rules, effective August 1, 1996, as supplemented or amended, in connection with connecting the Mountainair house track without protecting it with a derail, resulting in a roll-out at Mountainair, on August 5, 1998.
2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with seniority restored, he shall be paid for all wages lost and discipline shall be removed from his record.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

The claimant, foreman M. A. Flores, was allegedly instructed by roadmaster Charlie Gauna to apply a derail on the new track construction located at the east end of the house track at Mountainair, New Mexico. Subsequently, the claimant's crew connected a portion of the Mountainair house track to a switch on the main track without applying a derail. On August 5, 1998, four ballast cars located on the house track rolled eastward through the main line switch and onto the main track.

The claimant was instructed by the Carrier to attend an investigation in order to develop the facts and place responsibility, if any, in connection with a report which alleged that he failed to follow instructions and that he connected the Mountainair house track without

protecting it with a derail, which resulted in a roll-out at Mountainair on August 5, 1998. As a result of the formal investigation conducted on September 9, 1998, the Carrier issued the claimant a twenty-day Level S suspension for violating Rules 1.4, 1.6 and 1.13 of the Maintenance of Way Operating Rules (MWOR). Additionally, the Carrier placed the claimant on probation for a period of three years. The Board finds that the Carrier has satisfied its burden of proof in this case for the following reasons.

The Organization alleges that the formal investigation was not held by the Carrier in a timely manner. The record reveals that the roll-out at issue in this case occurred on August 5, 1998. Therefore, August 5, 1998, is the date upon which the Carrier first became aware of a possible rule violation by the claimant. On August 24, 1998, the Carrier issued a notice of investigation to the claimant. The Organization then requested a postponement of the investigation, which was finally conducted on September 9, 1998. Based upon these facts and circumstances, the Board finds that the Carrier conducted the formal investigation in a timely manner as set forth in Rule 13 of the Agreement.

Turning to the merits, the following rules are relevant to the Board's decision. Rule 1.4 of the MWOR, entitled "Carrying Out Rules and Reporting Violations," provides as follows:

Employees must cooperate and assist in carrying out rules and instructions. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or

employees, and any misconduct or negligence that may affect the interest of the railroad.

Rule 1.13 of the MWOR, entitled "Reporting and Complying with Instructions," provides as follows: "Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

At the investigation, roadmaster Gauna testified that he instructed the claimant to install a derail upon completion of the work on the house track at Mountainair. Roadmaster Gauna stated, as follows: "I also reminded them that the derail, the derail post was laying up against the telephone pole a little bit to the northeast of where we started the job." In contrast to the testimony of roadmaster Gauna, the claimant testified that he was not instructed to install a derail on the house track. However, the claimant acknowledged that cars could roll out from the house track onto the main track if brakes failed or were improperly set. Based upon the testimony, the Board concludes that it was more probable than not that the claimant was instructed to install a derail on the house track, and the claimant should have been aware that the installation of a derail was necessary to ensure a safe workplace through prevention of a roll out.

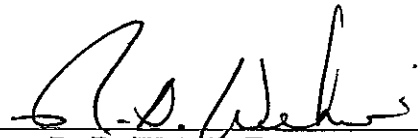
Rules 1.4 and 1.13 of the MWOR require employees to cooperate in carrying out rules and to comply with instructions from supervisors who have the proper jurisdiction. The claimant violated these rules because he did not comply with the instructions given to him by roadmaster Gauna. Therefore, the Board finds that the Carrier has satisfied its burden of

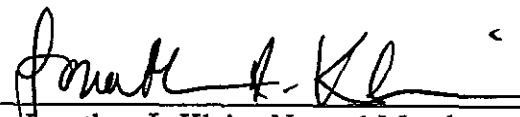
proof that the claimant violated these rules. For each of these reasons, the discipline assessed the claimant was warranted and the claim must be denied.

AWARD

The claim is denied.


Thomas M. Rohling, Carrier Member


R. B. Wehrli, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 29th day of June, 1999.